UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 10 2012

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable James M. Inhofe
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senator Inhofe:

Thank you for your May 24, 2012 letter to Administrator Lisa Jackson regarding the United States Environmental Protection Agency's (the EPA) plans to enforce Clean Water Act (CWA) requirements in light of the Supreme Court's decision in *Sackett v. EPA* which held that CWA section 309(a) administrative compliance orders are now subject to pre-enforcement review by the federal courts. I appreciate the opportunity to discuss the EPA's enforcement program.

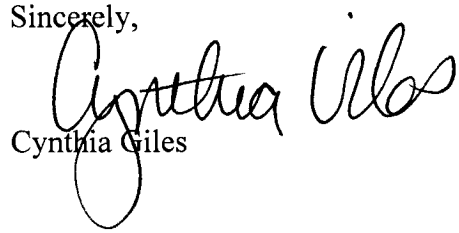
The EPA will, of course, fully comply with the Supreme Court's decision as we work to protect clean water for our families and future generations by using the tools provided by Congress to enforce the CWA. The Supreme Court's decision marked a significant change in the law concerning the reviewability of Section 309(a) administrative compliance orders. Prior to the Supreme Court's decision, all five federal circuit courts to consider the question had held that Section 309(a) administrative compliance orders were not subject to pre-enforcement review. We are taking all necessary steps to ensure that compliance orders issued by the agency comply with the Court's mandate. The EPA has directed all enforcement staff to ensure that the regulated community is fully aware of the right to challenge a Section 309(a) administrative compliance order and to include language explicitly informing respondents of this right with any unilateral Section 309(a) administrative compliance order issued by the agency. Attached is a memorandum from Pamela J. Mazakas, Acting Director of the Office of Civil Enforcement, to the regions highlighting the importance of the *Sackett* decision and informing them of the consequent changes to the CWA enforcement program.

In your letter, you express concern about remarks made by an EPA enforcement official at the *ALI ABA Wetlands Law and Regulation Seminar* on May 3, 2012, as reported by the publications *Inside EPA* and *BNA*. Both articles focused solely on a single statement by the EPA official and implied that the *Sackett* decision has not changed the EPA's approach to enforcement of the CWA. However, this single statement taken out of context does not accurately represent the overall message from this presentation or the agency's position that the *Sackett* decision does significantly change the law concerning reviewability of CWA administrative compliance orders. The focus of the presentation and discussion at the May 3, 2012 seminar was that compliance orders issued under 309(a) of the CWA will now be subject to judicial review and that the agency will ensure that its compliance orders are supported by an administrative record that describes the factual and legal basis for the order. It was clear from the entire presentation by the EPA speaker that EPA has and will continue to exercise sound principles of evidence gathering and legal analysis to support its administrative compliance orders, and that the EPA expects that judicial review would reaffirm the factual and legal support for orders issued by the agency. The

EPA has consistently stated since the *Sackett* decision that recipients of CWA section 309(a) compliance orders must be afforded an opportunity to challenge them in court. The agency is confident in the integrity of its administrative enforcement process and, as always, will issue compliance orders only when they are well supported by the facts and the law.

Again, thank you for your letter. If you have any questions, please contact me or have your staff contact Carolyn Levine, Office of Congressional and Intergovernmental Relations, at (202) 564-1859.

Sincerely,



Cynthia Giles

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 19 2012

MEMORANDUM

SUBJECT: Use of Clean Water Act Section 309(a) Administrative Compliance Order Authority after *Sackett v. EPA*

FROM: Pamela J. Mazakas, Acting Director
Office of Civil Enforcement

TO: Addressees

As you know, on March 21, 2012, the Supreme Court ruled unanimously in *Sackett v. EPA*, 132 S. Ct. 1367, that administrative compliance orders issued under Section 309(a) of the Clean Water Act (CWA) are subject to pre-enforcement judicial challenge under the Administrative Procedure Act (APA). The Supreme Court's decision marked a significant change in the law concerning the reviewability of Section 309(a) administrative compliance orders. Prior to the Supreme Court's decision, all of the federal circuit courts to consider the question had held that Section 309(a) administrative compliance orders were not subject to pre-enforcement review.[1] The purpose of this memorandum is to provide guidance on the use of Section 309(a) administrative compliance order authority in response to the *Sackett* decision.

As a result of the Supreme Court's holding, recipients of Section 309(a) administrative compliance orders are now afforded an opportunity to challenge those orders under the APA, before EPA brings an action to enforce the order, a right not previously available to them in the courts. It is therefore incumbent on EPA enforcement staff to ensure that the regulated community, and in particular all recipients of Section 309(a) administrative compliance orders, are fully aware of this new right. Language clearly informing respondents of this right should be included with any unilateral Section 309(a) administrative compliance order issued by the Agency.

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[1] *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir.), cert. denied, 513 U.S. 927 (1994); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990); *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010), rev'd, 132 S. Ct. 1367 (2012); *Laguna Gatuna, Inc., v. Browner*, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1996).

The Supreme Court's decision presents the Agency with an opportunity to evaluate how it can make the best use of limited enforcement resources to achieve compliance with environmental laws. While issuance of Section 309(a) administrative compliance orders remains a valuable tool to ensure compliance with the CWA, enforcement staff should continue to evaluate other enforcement approaches to promote compliance where appropriate in given circumstances. Other tools, such as less formal notices of violation or warning letters, can sometimes be helpful in resolving violations.

EPA enforcement staff should continue the practice of inviting parties to meet and discuss how CWA violations (and amelioration of the environmental impacts of such violations) can be resolved as quickly as possible. The goal of the administrative enforcement process is to address violations preferably by a mutually-agreed upon resolution through measures such as an administrative compliance order on consent. Using consensual administrative compliance orders, when possible, can help to reduce EPA and third party costs where regulated entities are willing to work cooperatively to quickly correct CWA violations and abate potential harm to human health and the environment.

Finally, the judicial review of Section 309(a) administrative compliance orders provides the opportunity to be even more transparent in demonstrating the basis for our enforcement orders. The Agency has historically exercised sound principles of evidence gathering and legal analysis to support its administrative compliance orders and is confident that judicial review would reaffirm the Agency's longstanding practice. The *Sackett* decision underscores the need for enforcement staff to continue to ensure that Section 309(a) administrative compliance orders are supported by documentation of the legal and factual foundation for the Agency's position that the party is not in compliance with the CWA. This will aid in the successful defense of any Section 309(a) administrative compliance order in court, should an order be challenged, and allow us to fulfill our statutory responsibility to address violations affecting the nation's waters.

We will continue to work closely with the Regions, Office of General Counsel, and the Department of Justice on any issues identified as we continue to evaluate and respond to the Supreme Court's decision. Thank you in advance for your ongoing cooperation. If you have additional questions, please contact me or Mark Pollins at (202) 564-4001.

Addressees:
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